IN THE

Supreme Court of the United States

October Term, 1962

No. ~~1325~~ 146

THE COLORADO ANTI-DISCRIMINATION COMMISSION AND EDWARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER, GENE MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE, AND GEORGE O. CORY, as members of said Commission,
Petitioners,

v.

CONTINENTAL AIR LINES, INC., *Respondent.*

No. 1325 Misc.

MARLON D. GREEN, *Petitioner,*

v.

CONTINENTAL AIR LINES, INC., *Respondent.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF FOR RESPONDENT IN OPPOSITION

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CITATIONS

CITATIONS (CONTINUED)

IN THE

Supreme Court of the United States

October Term, 1961

No. 1001

THE COLORADO ANTI-DISCRIMINATION COMMISSION AND EDWARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER, GENE MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE, AND GEORGE O. CORY, as members of said Commission, *Petitioners,*

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OPINION BELOW

The opinion of the Supreme Court of Colorado (Comm. Pet. App. A, 20-48; Green Pet. App. D, 1-20) is reported at 368 P.2d 970.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on February 13, 1962 (637). Timely petitions for rehearing were filed by Petitioners herein on February 21, 1962 (Colorado Anti-Discrimination Commission) (670) and February 28, 1962 (Marlon D. Green) (675). The original opinion of the court below was modified on rehearing and, as modified, adhered to by order of court dated March 5, 1962 (678). The jurisdiction of this Court is invoked by Petitioners under 28 U.S.C.A. § 1257(3) upon allegations that the validity of a state statute is drawn into question on the grounds of repugnancy to the Constitution and laws of the United States (Comm. Pet. 2; Green Pet. 3). Respondent submits that this Court lacks jurisdiction under 28 U.S.C.A. § 1257(3) because the opinion of the court below rests upon an adequate and independent non-federal ground. Moreover, it is Respondent's position that even if the requisites for jurisdiction under 28 U.S.C.A. § 1257(3) are technically present, the proceedings below fail to tender the constitutional issue sought to be reviewed in such form as to render it ripe for decision by this Court. Respondent's jurisdictional arguments are fully set forth, *infra*, pp. 12-18.

QUESTIONS PRESENTED

1. Whether the decision below rests upon an adequate and independent non-federal ground where, in addition to discussion of federal questions by the Supreme Court of Colorado, that court (1) affirmed the decision of the trial court without reservation and approved the trial court's findings and conclusions, and (2) the decision of

the trial court specifically held ". . . that the Colorado legislature was not attempting to legislate concerning problems involving interstate commerce."

2. Whether this Court should exercise jurisdiction, even if the technical requirements of 28 U.S.C.A. § 1257(3) are met, where the constitutional issues presented to this Court are not presented in clear-cut and concrete form, unclouded by serious problems of construction relating to the terms of the questioned legislation and its interpretation by the state court because (1) the opinion below indicates the decision was based at least in part upon a non-federal ground, and (2) the court below, having decided the Commission lacked jurisdiction over Respondent, has not passed upon other questions raised by Respondent relating to the terms of the questioned legislation and its interpretation and application under the constitution and laws of the State of Colorado.

3. Whether the Commerce Clause of the United States Constitution bars the application of the Colorado Anti-Discrimination Act of 1957 to an interstate air carrier with respect to its flight crew personnel.

4. Whether either the Civil Aeronautics Act (now the Federal Aviation Program Act) or the Railway Labor Act prohibit racial distinctions by interstate air carriers as to flight crew personnel engaged in interstate operations and pre-empt that field, thereby precluding application of the Colorado Anti-Discrimination Act of 1957.

STATUTES INVOLVED

The pertinent constitutional and statutory provisions are adequately set forth in the petition of the Colorado Anti-Discrimination Commission (Comm. Pet. 3).

STATEMENT

In the court below the Colorado Anti-Discrimination Commission, the individual members thereof (herein collectively referred to as the "Commission") and Marlon D. Green were plaintiffs in error. Separate petitions have been filed in this Court by Green, Petitioner in No. 1325 Misc., and by the Commission, Petitioner in No. 1001. This brief is filed by Continental Air Lines, Inc., defendant in error below, in opposition to both such petitions. References to the consolidated record will be by page number without further identification.

Continental is a commercial carrier by air, certificated by the Civil Aeronautics Board, and engaged in the business of transporting freight, passengers and United States mail. It serves eight states from Illinois to California. The Commission is an administrative agency of the State of Colorado operating under the provisions of the Colorado Anti-Discrimination Act of 1957, 1953 Colo. Rev. Stat. 80-24-1 et seq. (1960 Perm. Supp.).

These proceedings were commenced when Green lodged a complaint with the Commission in which he alleged (1) that he had been denied employment as a pilot by Continental because he was a Negro, (2) that Continental had failed to advise him as to action taken on his application for employment, and (3) that Continental's application

form violated the Act in two particulars, viz., by containing a space for the race of the applicant to be indicated, and by requesting each applicant to submit a photograph with the application form (165). Continental's answer admitted that applicants were requested to furnish a photograph, denied that such request was for a discriminatory or illegal purpose, and denied each of the other material allegations in Green's complaint. It also, as acknowledged by the petitions herein of both the Commission and Green, challenged at the outset (a) the jurisdiction of the Commission over the subject matter of the complaint, and (b) the power of the Commission to regulate Continental's interstate operations (174-75).

The Commission held a hearing on the issues raised by Green's complaint and Continental's answer and thereafter entered certain findings of fact and conclusions of law, in which it "assumed" the constitutionality of the Act, asserted jurisdiction over the subject matter, and entered orders adverse to Continental (509). In accordance with 1953 Colo. Rev. Stat. 80-24-8 (1960 Perm. Supp.) which provides for judicial review of orders entered by the Commission, Continental filed a complaint and petition to review in the Denver District Court. The District Court, in the first of several hearings, held that the Commission had failed to make findings on a number of key issues, including certain issues pertaining to Continental's defense based upon the interstate character of its flight operations. The action was accordingly remanded to the Commission for additional findings on specified issues (44).

The Commission, however, failed to heed the mandate of the District Court. Instead, it ruled that its December 1958 order was at least partially "defective" (531), or,

as counsel for the Commission phrased it in open court, it "was not, in fact, an order" (113). Thereupon, the Commission purportedly "withdrew" its first order, and upon its own motion and without notice to the parties or a hearing of any kind, issued an entirely new "Decision" which differed substantially in scope, form and substance from the first order (526-544). This unique procedural action of the Commission ultimately led to the initial review of this case by the Supreme Court of Colorado, which held that the attempt to enter substituted findings and orders was in excess of the Commission's jurisdiction and void. The action was returned to the Denver District Court with instructions to pass upon the merits of the dispute. Green Pet. App. C; 143 Colo. 590, 355 P.2d 83 (1960).

The petitions of the Commission and Green convey the erroneous impression that the only issue of substance litigated in this proceeding concerned the effect of the Commerce Clause on the Commission's attempted regulation of Continental. The converse is true. While Continental's second claim alleged that the United States had, by various statutes and regulations, exercised exclusive jurisdiction and control over the operations of interstate air carriers, and asserted that attempted state regulation constituted an impermissible burden on commerce (7), its first claim was based on the premise (a) that the Commission was without jurisdiction over the subject matter of the proceeding, and (b) that the Commission had purported to act in excess of the jurisdiction conferred upon it by the Act (6-7).

It is also important to note that Continental vigorously challenged the sufficiency of the evidence to support

the Commission's findings. It was not disputed that Continental interviewed 14 pilot applicants in June 1957, of whom six, including Green, were found qualified to undergo the Company's flight training program. Of the six found to be so qualified, four were enrolled in the July training class. The names of Green and the sixth man were retained as qualified applicants eligible for employment (327) and Green was so advised (251). His name was withdrawn from Continental's list of qualified applicants only after it was learned that he had embarked upon a series of suits against other employers.[1] Continental believed that involvement in such other proceedings would have materially hindered his flight training. Moreover, because of the importance to its business of the impression of stability conveyed by its pilots, it was Continental's policy not to hire, or to retain pilots who became involved in public controversy (328-29, 345).

The only evidence which could arguably be said to support Green's complaint came from agents of the Commission who testified as to conversations with a Continental vice president. During one of these conversations the Continental representative, speaking as an individual, mentioned certain possible adverse effects which could be occasioned by the employment of a colored pilot by any airline. Continental, while denying that these statements indicated a discriminatory purpose, asserted that they had been made during an attempted conciliation and compromise and were privileged and thus inadmissible, both by agreement and by statute.

In addition to its attack on the jurisdiction of the

[1] See opinion of the trial court (Comm. Pet. App. D, 59-60).

Commission over these proceedings, Continental raised serious constitutional objections to the manner in which the hearing and post-hearing procedures were conducted. Although Green's complaint was set for hearing before the entire Commission sitting as hearing examiners, the actual proceedings were conducted before varying groups of commissioners. Only five of the seven commissioners were present at any time during the first day of the hearing, only three commissioners were present at any time during the second day of the hearing, and only two of the commissioners were present during the entire proceedings. One of the commissioners attended only the hearing session during which Green testified on direct examination (235). Although the Commission's own rules and regulations require the hearing examiners to submit findings of fact and the basis therefor to the Commission (Rule 11(a), 523), no such findings were made in this case. Instead, the entire Commission, including those members who were never present as well as those who attended only portions of the hearing, purported to make credibility evaluations and enter findings of fact and conclusions.

As merely one example of the utter disregard of the Commission for the due processes of law, it found that in June 1957 Continental violated the regulations of the Commission by asking Green for a photo to be attached to his employment application (507) when in fact the regulations allegedly violated were not promulgated until November 1957. Similarly, although the Colorado Administrative Code specifically prohibits an officer who presides at an administrative hearing from engaging in the performance of either an investigative or prosecuting function in the same matter (1953 Colo. Rev. Stat. 3-16-4(6) (1960 Perm.

Supp.), the chairman of the Commission who presided at the Commission hearing on Green's complaint against Continental (176), found no impropriety in subsequently appearing before the Supreme Court of Colorado as a Special Assistant Attorney General to prosecute the Commission's appeal against Continental. 143 Colo. 590, 591, 355 P.2d 83 (1960).

The hearing on Green's complaint was held on May 7 and 8, 1958. It is significant that neither the Commission itself nor any commissioner filed a complaint in this case as they are permitted to do under the Act. 1953 Colo. Rev. Stat. 80-24-7(1) (1960 Perm. Supp.). The only matter before the Commission was the complaint of Green, a private individual.

On December 14, 1958, before the Commission had entered an order of any kind with respect to Green's complaint, Green sent the following telegram to the Commission with a copy to Continental:

> "Urgently request withdrawal of my complaint against Continental Air Line. Signed, Marlon D. Green." (15)

Notwithsfanding this emphatic telegram, the Commission, on December 19, 1958, entered its initial decision in which it stated, without giving any reason therefor, that the hearing examiners refused to consent to the withdrawal and pursuant to which Green was given an option to take advantage of the order against Continental (509). He subsequently elected to do so.

The validity of the regulation by which the Commission attempted to limit Green's right to withdraw his com-

plaint, and the action of the hearing examiners in withholding consent to such withdrawal, were briefed and argued at length in both the Denver District Court and the Supreme Court of Colorado. It was and is Continental's position that the regulation which attempted to limit the withdrawal of Green's private complaint, as distinguished from a complaint filed by the Commission, is in derogation of the statutory purpose to resolve by conciliation or settlement private disputes pertaining to racial or religious matters, and is therefore beyond the power of the Commission to adopt and hence invalid. It is Continental's further position that the action of those unidentified hearing examiners who refused to consent to the withdrawal was equally inconsistent with the purpose of the Act and improper.

It was in this posture that the action came on for review on the merits by the Denver District Court. Because that court concluded that Continental's jurisdictional claims were determinative, it did not reach the several other bases on which relief was sought. The trial court, in an extensive opinion, first examined the statute and found that "the Colorado legislature was not attempting to legislate concerning problems involving interstate commerce" (Comm. Pet. App. D, 59). It then recognized that one of the salient elements of interstate transportation was its routine and frequent multi-state contacts (Comm. Pet. App. D, 71). Thereafter, it further found that the Act could not be constitutionally extended to cover flight crew personnel of interstate air carriers (Comm. Pet. App. D, 91). Based on these findings it set aside the findings of the Commission and dismissed the complaint (Comm. Pet. App. D, 91). The Supreme Court of Colorado, on writ of error, reviewed this decision of the District Court and,

while noting that ". . . the district court held the . . . Act, insofar as it purported to regulate the employment of flight crew personnel of an interstate air carrier, was invalid as creating a burden upon interstate commerce" (Comm. Pet. App. A, 22), it further found that "The only question resolved [by the trial court] was that of jurisdiction." (Comm. Pet. App. A, 27). The Supreme Court of Colorado held that "The trial court determined that the Act was inapplicable to employees of those engaged in interstate commerce. . ." and that the judgment of the trial court "was based exclusively upon that ground." (Comm. Pet. App. A, 27). Having thus interpreted the decision of the court below, it affirmed that decision, not only as to the result but also as to the District Court's findings and conclusions (Comm. Pet. App. A, 27).

Thus the issue is not whether Colorado has the general power to pass an anti-discrimination law. Such contention has not been made by Continental. The only orders in this case relate specifically to flight crew personnel of interstate air carriers, and the issue which has been ruled upon is whether the Colorado Act is applicable to such persons.

The Colorado Supreme Court noted that other issues remain in the case when it stated:

> "If the question [whether the Colorado statute may be applied to flight crew personnel of an interstate air carrier] is answered in the negative other arguments directed to the merits of the action, and questions relating to the validity of the act when tested by provisions of the Colorado Constitution are academic and of no materiality to the issue to be determined." (Comm. Pet. App. A, 27).

Continental's position with respect to these matters has been indicated above. Such other issues involve important substantive and procedural questions which have not been ruled upon at any time by any court.

ARGUMENT

I. This Court Lacks Jurisdiction on Certiorari Because the Colorado Supreme Court Relied, inter alia, Upon an Independent and Adequate Non-Federal Ground as a Basis for its Decision.

It would appear that Petitioners interpret the opinion of the Colorado Supreme Court as being based solely on the Commerce Clause issues of pre-emption and burden on commerce. Continental contends that this is not so. Continental submits that the decision of the Colorado Supreme Court is that the Commission did not have jurisdiction in the matter for three reasons: first, the Colorado statute did not give the Commission jurisdiction over Continental as to its flight crew personnel; second, Congress has pre-empted this field; and third, if applied to Continental in this case the Colorado Act is an unconstitutional burden on commerce. Continental is of course aware that the Colorado Supreme Court modified its first opinion and will discuss that subject in more detail below. Notwithstanding that modification Respondent submits that the independent non-federal ground remains as a basis for the decision of the Colorado Supreme Court and the petitions for certiorari should therefore be denied.

The trial court included a non-federal ground as a basis for its decision. That court held "that the Colorado legislature was not attempting to legislate con-

cerning problems involving interstate commerce'' when it enacted the 1957 Colorado Act (Comm. Pet. App. D, 59). It arrived at this conclusion after reviewing the 1957 Act and other pertinent Colorado statutes (Comm. Pet. App. D, 57-59). The trial court also held that the Act, to the extent applied to Continental's flight crew personnel, was invalid as creating a burden upon commerce and that Congress had pre-empted that area (Comm. Pet. App. D, 91). The Colorado Supreme Court clearly affirmed the trial court's decision on the pre-emption and burden grounds (Comm. Pet. App. A, 22, 25). However, the Colorado Supreme Court interpreted the trial court's decision as resting on the state ground also, stating that ''the only question involved was that of jurisdiction'', that ''the trial court determined the act was inapplicable to employees of those engaged in interstate commerce'' and that the judgment of the trial court ''was based exclusively on that ground.'' (Comm. Pet. App. A, 27). Indeed, in its original opinion the Colorado Supreme Court stated, as the basis for the non-federal ground, the identical rationale of the trial court in practically identical language as follows:

> ''This language [referring to Colorado Revised Statutes of 1953, 80-24-2(5)] negatives the idea that there was any attempt on the part of the legislature to legislate upon a matter involving interstate commerce.''

The Colorado Supreme Court without explanation deleted this single sentence in its final opinion when the petitions for rehearing filed by Green and the Commission were denied. Otherwise the original opinion remains unchanged. In the opinion as it now stands the Colorado Supreme Court sets forth at length with apparent approval earlier

state laws recognizing federal jurisdiction and authority in the realm of aeronautics (Comm. Pet. App. A, 22-24). Furthermore the Colorado Supreme Court not only affirms the trial court's findings and conclusions without reservation, it goes on to say:

> "The findings, conclusions and judgment of the trial court might well be adopted in toto as the opinion of this court. However in the interest of brevity we will do no more than mention a few decisions which we think control the result." (Comm. Pet. App. A, 27).

Such approval of the trial court's decision and apparent reliance on other state statutes acknowledging federal authority leads to the conclusion that this independent non-federal ground remains as one of the three separate reasons for the decision of the Colorado Supreme Court that the Commission did not have jurisdiction in this case.

Thus, the opinion of the court below, even as amended, still finds that the trial court determined the Act was inapplicable to employees of those engaged in interstate commerce, and continues to affirm the decision of the trial court and to approve of the basis of that decision (Comm. Pet. App. A, 27). These factors, Respondent submits, are sufficient to show a non-federal ground for the decision below, fatal to jurisdiction in this Court.

Petitioner Green, and the Commission in its petition, however, allege jurisdiction in this Court under 28 U.S.C. A. § 1257(3) stating, in effect, that the decision below rests solely upon a holding that the 1957 Colorado Act is invalid as in conflict with the provisions of Article I, Section 8, Clause 3 of the Constitution of the United States,

and because of conflict with federal statutes which pre-empt the field (Green Pet. 3; Comm. Pet. 2). However, if Continental's analysis of the proceedings and opinion below is correct, this is not the case, and it is well settled that this Court lacks jurisdiction on certiorari if the decision below rests upon an adequate independent and tenable[2] non-federal ground. See, e.g., *Wolfe v. North Carolina*, 364 U.S. 177 (1960) (Note 3 to the majority opinion); *Murdock v. Memphis*, 20 Wall. 590 (U.S. 1875); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *Herb v. Pitcairn*, 324 U.S. 117 (1945); see also *Quong Ham Wah Co. v. Industrial Commission*, 255 U.S. 445 (1921) at 448-49, where this Court held the state court's interpretation of a state statute, which avoided the federal question, was an adequate non-federal ground sufficient to deprive this Court of jurisdiction, even though the state court reached its interpretation of the statute only because it believed that to read the act otherwise would render it unconstitutional.

It is difficult if not impossible to explain the form and substance of the Colorado Supreme Court's opinion without reaching the conclusion that the non-federal ground is one basis for the decision that the Commission did not have jurisdiction. Respondent submits that a careful reading of that opinion confirms this conclusion.

If, as construed by the courts below, the Colorado Act does not confer jurisdiction upon the Commission over

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[2]It should be noted that the Colorado Anti-Discrimination Act of 1957 is a general statute. It does not, in specific terms, purport to apply to flight crew personnel of Respondent, and therefore an interpretation of the Act by the state court to the effect that it does not apply to such personnel (employees of those engaged in interstate commerce) is clearly permissible.

Continental as to flight crew personnel, this Court lacks jurisdiction on certiorari because the construction to be placed upon a state statute is one of state, not federal law. Cf., *Railway Commission of Texas v. Pullman Co.*, 312 U. S. 496 (1941). Any determination of the Commerce Clause issues by this Court would "thus leave unaffected" the state court's judgment. Cf., *Flournoy v. Weiner*, 321 U.S. 253 (1944). In such a situation review of the decision below by this Court on certiorari should be denied. *Fox Film Corp. v. Muller, supra.*

II. Even Assuming, Arguendo, That the Jurisdictional Requisites for Review of This Case on Certiorari Are Technically Present, This Court Should Deny the Writ Because the Questions Which Bring the Case to This Court Are Not Ripe for Decision.

This Court has held, notwithstanding that the jurisdictional requisites for review by this Court are technically met, that its jurisdiction should be exercised only when the constitutional issues sought to be reviewed are presented in unambiguous and concrete form, unfettered by serious problems pertaining to the interpretation or application of the legislation in question by the state court. *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947).[3]

In cases where this requisite is not met, this Court has said:

> ". . . the writs must be dismissed because constitutional questions which brought these cases here are not ripe for decision . . ." *Parker v. Los Angeles County*, 338 U.S. 327, 333 (1949).

[3] Cf., **Naim v. Naim**, 350 U.S. 891 (1955); **International Brotherhood v. Denver Milk Producers**, 334 U.S. 809 (1948).

Respondent submits the present case is of a similar nature. One basis of the decision by the Supreme Court of Colorado is, as Respondent contends above, an independent non-federal ground. There are other reasons why this case does not present constitutional questions in a form appropriate for determination by this Court. If the decision of the Supreme Court of Colorado be interpreted as deciding the case solely on federal constitutional grounds, rather than on an independent non-federal ground as above set forth, the well established doctrine that a court should not reach constitutional questions if the case may be decided on other grounds was ignored. *State of Colorado v. American Can Co.*, 117 Colo. 312, 186 P.2d 779 (1947); *Gale v. Statler*, 47 Colo. 72, 105 Pac. 858 (1909). Such lack of judicial restraint should not lightly be imputed to the Supreme Court of Colorado.

As the opinion below notes:

> ". . . other arguments directed to the merits of the action, and questions relating to the validity of the act when tested by the provisions of the Colorado constitution . . ." (Comm. Pet. App. A, 27).

were submitted but have not been determined. If the Supreme Court of Colorado had not based its decision, at least in part, upon an adequate state ground, it would have considered and determined one or more of the other unresolved issues tendered by Respondent in both courts below, including the following:

1. The Commission erred in the reception of evidence and by not granting Continental's motion to dismiss; the Commission's findings are not supported by substantial evidence.

2. As a matter of law these proceedings were, or should have been, terminated when Green withdrew his complaint prior to the initial decision of the Commission.

3. The actions of the Commission violated the Act, ignored the Commission's own rules and regulations, and contravened rights guaranteed to Continental by both the Colorado and United States constitutions; such irregularities, both during and after the Commission hearing, rendered the Commission's findings of fact and orders void.

Thus it affirmatively appears from the record and opinion below that the constitutional issues sought to be reviewed here are clouded by serious problems relating to the interpretation and application of the state statute by the Supreme Court of Colorado. Under such circumstances certiorari should be denied.

III. The Writ of Certiorari Should Not Be Issued Because the Decision of the Court Below Is Clearly Correct.

Assuming *arguendo* that the decision of the Supreme Court of Colorado was based solely upon a holding that the United States Constitution forbids application of the Colorado Anti-Discrimination Act to the facts of this proceeding, that decision was clearly correct and consequently no writ of certiorari should issue. If the decision was solely upon constitutional grounds, it rests upon a finding of two separate and independent conflicts with the United States Constitution. If the Colorado Supreme Court was correct in finding that *either* of Respondent's constitutional positions was meritorious, no writ should issue.

Respondent asserts that *both* positions were correctly accepted by the Colorado courts.

Continental has consistently maintained that the Colorado Anti-Discrimination Act may not constitutionally be applied to the flight crew personnel of an interstate air carrier for the following two reasons, either of which alone precludes such application: (a) burden on commerce; (b) pre-emption of the subject matter by Acts of Congress. Continental asserted these two defenses in its first pleading in this case. The defenses were thereafter maintained by Continental at all stages of this litigation.[4] The Commission did not expressly reject either of these two defenses but did "assume" the constitutionality of the statute (509). The trial court in a comprehensive opinion held that both defenses were meritorious (Comm. Pet. App. D, 56-91) and the Supreme Court of Colorado affirmed the trial court's decision on both of these issues (Comm. Pet. App. A, 17-48).

Continental will first consider the proposition that an application of the Colorado Anti-Discrimination Act to the facts of this case would constitute an unconstitutional burden on commerce. The Colorado courts held that it would be such a burden. This holding is not contrary to the holdings of this Court; instead, it is in accord with decisions of this Court going back over 80 years. *Morgan v. Virginia*, 328 U.S. 373 (1946); *Hall v. DeCuir*, 95 U.S. 485 (1878).

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[4]Continental asserted its two constitutional defenses in the proceedings before the Commission (174-75), in its petition to review the Commission's order (7-8), in the proceedings before the trial court, and in the appeal proceedings before the Colorado Supreme Court. Comm. Pet App. A, 26-27.

In *Hall* this Court held that a state statute which *prohibited* discrimination by an interstate steamship carrier imposed a burden on commerce and hence was unconstitutional. The Court unanimously held that uniformity was required in this area and therefore Congress had the exclusive power to regulate. Inaction by Congress was equivalent to a declaration that this aspect of commerce should remain free of and untrammeled by state regulation.[5] In *Morgan* this Court applied the burden on commerce rule to strike down a state statute which *required* segregation of passengers on motor carriers. Hence, this Court's application of the prohibition against burdens on commerce in this area has been consistent and neutral, and the rule is clear — the question of racial discrimination in the interstate operations of common carriers requires uniform national treatment and attempts by a state to regulate cannot stand.

Both petitions appear to recognize that the opinions of this Court in *Hall* and *Morgan* present formidable obstacles to their position. However, they do not suggest such a bold step as the overruling of these cases, and other cases decided in reliance upon the rules there enunciated. They seek in various ways to distinguish or discredit these cases, particularly *Hall*.[6]

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[5] For the purpose of this portion of the argument only, Respondent assumes that Acts of Congress have not pre-empted the field. In the absence of such statutory pre-emption, the Commerce Clause itself occupies the field and precludes state action as to those subjects which "require a general system or uniformity of regulation." **Minnesota Rate Cases**, 230 U.S. 352 (1913). See also **Southern Pacific Co. v. Arizona**, 325 U.S. 761 (1945).

[6] Both petitions are more zealous in attacking **Hall** (which struck down a state statute **prohibiting** discrimination) than **Morgan** (which declared unconstitutional a state statute **imposing** segregation), even though the same constitutional principle was applied in both cases. The Colorado Supreme Court noted that counsel for the Department

The Commission asserts that *Hall* was "handed down seventy-six years prior to *Brown v. Board of Education*, 347 U.S. 483", that the case "has been evaded [sic] and devitalized" and that " it has no vitality today." (Comm. Pet. 12). The Colorado Supreme Court's opinion notes and rejects the same unsupported assertions (Comm. Pet. App. A, 30-31). Neither before the Colorado Supreme Court, nor in either petition, is any case by this Court (or, for that matter, by any court) cited in support of those assertions. In fact, the converse is true. Since *Hall* was decided, it has been cited in not less than 35 cases by this Court, and numerous times by other courts. *Shepard's United States Citations.*

Continental has found no case questioning the soundness of *Hall*, and Petitioners cite none. On the contrary, it is difficult to find a more express approval of a case than that given *Hall* in the majority opinion of this Court in *Morgan*:

> "The factual situation set out in preceding paragraphs emphasizes the soundness of this Court's early conclusion in Hall v. DeCuir, 95 U.S. 485." 328 U.S. at 383.

Mr. Justice Frankfurter, concurring, expressed his ap-

"(Continued)
of Justice, appearing there as amicus curiae, had taken a similar position by first citing **Hall** with approval in a brief to this Court when the principle of that case was useful to the anti-discrimination stand there taken, and then rejecting **Hall** in the present proceeding when its doctrine was troublesome. The Colorado Supreme Court compared this to "attempts like the Roman god Janus to face both ways" (Comm. Pet. App. A, 30-31). Phrased differently, it represents an attempt to depart from this Court's application, in **Hall** and **Morgan**, of a constitutional principle in a neutral and consistent manner. See, Wechsler, **Toward Neutral Principles of Constitutional Law**, 73 Harv. L. Rev. 1 (1959).

proval of *Hall* in similar language.[7] *Hall* was cited by this Court with apparent approval as late as 1960. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 444 (1960).

Other attempts to discredit or distinguish the doctrine of *Hall* and *Morgan* are of even more doubtful relevance. Both petitions rely upon *Railway Mail Association v. Corsi*, 326 U.S. 88 (1945). (Comm. Pet. 15-16; Green Pet. 9-11). However, *Corsi* did not in any way involve the Commerce Clause of the United States Constitution.[8] Similarly, Respondent's reading of *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948), relied upon by Green, discloses no disapproval of that doctrine, but rather an express reaffirmance of the soundness of *Hall* and *Morgan*.[9]

Both Petitioners place some reliance on the Colorado Enabling Act and the 14th Amendment to the United States Constitution. The Enabling Act merely provides that the Colorado *constitution* shall "make no distinction in civil or political rights on account of race or color" nor "be repugnant to the constitution of the United States." No one has contended that the Colorado constitution makes

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[7] "My brother Burton has stated with great force reasons for not invalidating the Virginia statute. But for me Hall v. DeCuir, 95 U.S. 485, is controlling. Since it was decided nearly seventy years ago, that case on several occasions has been approvingly cited and has never been questioned. Chiefly for this reason I concur in the opinion of the Court." 328 U.S. at 388.

[8] The trial court in this case correctly analyzed **Corsi:**

"**Corsi**, interpreted most favorably to [Petitioners], only held neither the due process clause of the 14th Amendment, nor the equal protection clause, nor the clause conferring authority over postal matters upon Congress prevented a state from adopting a civil rights statute. The application of such a statute to interstate commerce was neither raised nor discussed nor decided." (Comm. Pet. App. D, 71).

[9] See the trial court's analysis of the **Bob-Lo** case. Comm. Pet. App. D, 69-71.

any such distinction or is repugnant to the U. S. Constitution. Similarly, with respect to the 14th Amendment, there is no issue in this case of state action to deny 14th Amendment rights and no denial of the power of Congress to enforce, by appropriate legislation, those rights. Finally, this case does not present a challenge to Colorado's general right to enact an anti-discrimination law pursuant to its police power. Only its application to personnel involved in the interstate operations of common carriers is in issue, and Continental submits that the decision of the Colorado Supreme Court is in accord with the decisions of this Court.

Even if the application of this state statute did not conflict with the requirement of the Commerce Clause for uniform national rules in this area, the decision of the Colorado Supreme Court is clearly correct for another reason. Two comprehensive federal acts govern Continental's conduct with respect to the matters here in issue and preclude extension of the Colorado Act to the facts of this case.

The Colorado Supreme Court specifically and correctly held that the pre-emption doctrine precludes application of the Colorado statute to the facts of this case:

> "Congress has pre-empted the field of law concerning racial discrimination in the interstate operations of carriers (generally and specifically with relation to employment of interstate operating personnel) and has thereby precluded exercise of authority by the several states in this field." (Comm. Pet. App. A, 25).

In addition, it is noteworthy that counsel for the Depart-

ment of Justice, appearing as amicus curiae in the proceedings before the Colorado Supreme Court, did not seriously question the applicability of the Civil Aeronautics Act to racial discrimination by interstate air carriers against applicants for employment.[10]

The Civil Aeronautics Act, 49 U.S.C.A. §§ 401 et seq. (now the Federal Aviation Program Act, 49 U.S.C.A. (Supp.) §§ 1301 et seq.) regulates and controls the racial policies of interstate air carriers. The plain and unambiguous language of the Aviation Act[11] specifically forbids any air carrier to subject any "person" to "any unjust discrimination." 49 U.S.C.A. § 484(b); 49 U.S.C.A. § 1374(b). In *Fitzgerald v. Pan American World Airways, Inc.*, 229 F.2d 499 (2d Cir. 1956), the court held that a carrier violated this statute by denying first-class passage because of race, and that the statute created an actionable civil right pursuant to which the person discriminated against could bring a federal action.[12] *Fitzgerald* is a clear holding that racial discrimination against "any person" in interstate air commerce is prohibited by federal law. The court also noted that "Congress sought uniformity in the practices of those subject to this Act." 229 F.2d

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[10]"The Government takes no position on whether the provision relied upon by the court below, or any other provision of federal law governing air commerce, proscribed or proscribes discrimination between applicants for employment on the basis of race." (Govt. Amicus Curiae Brief in proceedings before Colo. Sup. Ct. at p. 41).

[11]Since the applicable provisions of the Civil Aeronautics Act, in effect at the time of the alleged refusal to hire, and the Federal Aviation Program Act, now in effect, are identical Respondent refers to both Acts collectively as the "Aviation Act."

[12]For another holding that the preference and discrimination provisions of 49 U.S.C.A. § 484(b), as amended, create a cause of action enforceable in the federal courts at the suit of the injured party, see the recent district court decision in **Wills v. Trans World Airlines, Inc.**, 200 F. Supp. 360 (S.D. Cal. 1961).

at 502. Cf. *Northwest Airlines, Inc. v. Minnesota*, 322 U. S. 292, 303 (1944) (concurring opinion); *Mitchell v. United States*, 313 U.S. 80 (1941); *Allegheny Airlines, Inc. v. Cedarhurst*, 132 F. Supp. 871, 881 (E.D.N.Y. 1955), aff'd, 238 F.2d 812 (2d Cir. 1956).

Any doubt as to the scope or correctness of *Fitzgerald* was removed by the recent decision of this Court in *Boynton v. Virginia*, 364 U.S. 454 (1960), which held that Section 216(d) of the Interstate Commerce Act (49 U.S.C.A. § 316(d)), applicable to motor carriers, prohibited racial discrimination against an interstate bus passenger by a bus terminal restaurant which was "an integral part of the bus carrier's transportation service" but was not owned, operated or directly controlled by the bus company. This Court noted that the Interstate Commerce Act "uses language of the broadest type to bar discriminations of all kinds." 364 U.S. at 457. Since the applicable federal statutory provisions governing air carriers and motor carriers are identical in all material respects (compare 49 U.S.C.A. § 484(b) with 49 U.S.C.A. § 316(d)), it cannot be doubted that an air carrier is barred, by federal statute, from "discriminations of all kinds." Consequently, a pervasive and comprehensive federal statutory system, the Aviation Act, governs the racial policies of carriers subject to that Act, and normal pre-emption rules applicable to federal interstate commerce enactments, and the decisions of this Court, preclude the application of the Colorado statute to this field. *Missouri Pacific R.R. v. Stroud*, 267 U.S. 404 (1925). Cf. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (1957); *United States v. New York Central R.R.*, 272 U.S. 457, 464 (1926).

The Colorado courts correctly decided that the Colorado statute would not extend to this area.

Finally, the Railway Labor Act (45 U.S.C.A. §§ 151 et seq.), as interpreted by the courts, prohibits racial discrimination by carriers subject to that Act. *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, 775 (1952).[13] Although *Howard* dealt with discrimination against an employee rather than an applicant for employment, Continental submits that a fair reading of *Howard* and the other cases in this series, indicates that this Court has held that Congress intended to prohibit all types of racial discrimination by employers subject to the Railway Labor Act. Further, and of even more significance, the Colorado statute forbids discrimination against not only applicants for employment but also employees (1953 Colo. Rev. Stat. 80-24-6(2) (1960 Perm. Supp.)). It would be an anomalous result not warranted by authority to permit the Colorado statute to be applied to the employment of a pilot by an interstate air carrier when it could not be applied to discrimination in discharge, promotion or compensation of this same person.

[13] For a detailed discussion of the numerous decisions of this Court dealing with the Railway Labor Act's prohibition of racial discrimination by both unions and carriers subject to the Act, see the trial court's opinion. Comm. Pet. App. D, 76-81.

CONCLUSION

For the reasons stated above, it is therefore respectfully submitted that this Court should deny the Petitions for Writs of Certiorari.

Respectfully submitted,

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